U.S. Department of Labor

Office of Administrative Law Judges
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MAILED: 3/27/2001

IN THE MATTER OF:	
William P. Jablonski Claimant	
Against	Case No.: 2000-LHC-2924
General Dynamics Corporation Employer/Self-Insurer	OWCP No.: 1-76318
and	
Director, Office of Workers' Compensation Programs, United States Department of Labor Party-in-Interest	

APPEARANCES:

Stephen C. Embry, Esq.
For the Claimant

Peter D. Quay, Esq.
For the Employer/Self-Insurer

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER ON MODIFICATION - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33

U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was scheduled to be held on February 14, 2001 in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administration Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit, JX for a Joint exhibit and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

The following evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
ALJ EX 1	This Court's Notice of Hearings and Prehearing Order	11/15/00
ALJ EX 2	August 1, 2000 letter of referral from District Director Marcia D. Finn	08/08/00
ALJ EX 3	Claimant's Form LS-18	07/12/00
ALJ EX 4	November 28, 2000 letter of referral from District Director Marcia D. Finn	12/12/00
ALJ EX 5	Employer's Form LS-18	11/16/00
CX 1	Attorney Embry's letter filing the	12/29/00
JX 1	Parties' Joint Motion For Modification	12/29/00
JX 2	Memorandum In Support of a Motion For Modification	12/29/00
JX 3	May 23, 1990 Decision and Order	

06/01/90
Awarding Benefits issued by
District Chief Judge
Anthony J. Iacobo

JX 4 May 1, 2000 report of
12/29/00
John S. Urbanetti, M.D.

CX 2 Attorney Embry's letter
12/29/00
filing his

CX 3 Fee Petition
12/29/00

The record was closed on December 29, 2000 as no further documents were filed.

PROCEDURAL HISTORY

My most distinguished and now retired colleague and mentor, Anthony J. Iacobo, by **Decision and Order Awarding Benefits**, dated May 23, 1990 (JX 3), concluded that William P. Jablonski ("Claimant" herein) had been injured in the course of his maritime employment at the Employer's shipyard, that his exposures to asbestos dust and fibers and other injurious pulmonary stimuli at the shipyard has resulted in a pulmonary injury, that his injury has been diagnosed as involving chronic obstructive lung disease and pleural changes (COPD), that such injury had resulted in a 12.5 percent permanent partial impairment of the whole person, pursuant to Section 8(c)(23) of the Act, and that he was entitled to an award of benefits for such impairment, commencing on July 1, 1988, based upon his average weekly wage of $594.80. As the Employer was found entitled to the limiting provisions of Section 8(f) of the Act, the Employer's obligation for such benefits was limited to 104 weeks of permanent benefits. The Special Fund, established pursuant to Section 44 of the Act, then assumed payment of those benefits to the Claimant and those benefits are currently being paid to the Claimant by the Special Fund. (JX 3)

The parties, alleging that Claimant's physical condition has worsened, have filed a **Joint Motion For Modification** (JX 1) and

a **Memorandum In Support Of A Motion For Modification** (JX 2) in support thereof.

Accordingly, in view of the foregoing, there is now no need for a formal hearing and the hearing, previously scheduled for Wednesday, February 14, 2001, at our Courtroom in New London, Connecticut (ALJ EX 1), is hereby **Cancelled**. The motion for modification is **GRANTED** and I shall now consider the merits of the motion.

Initially, I note that the Findings of Fact and Conclusions of Law made by District Chief Judge Iacobo are binding upon the parties by **Res Judicata** and Collateral Estoppel as that decision is now final.

On the basis of the totality of this closed record, I make the following:

Additional Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v.**

Bethlehem Steel Corp., 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v.**

Director, OWCP, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his chronic obstructive lung disease and pleural plaques, resulted from his exposure to and inhalation of asbestos dust and fibers and other injurious stimuli at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. In this regard, **see Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989). Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as was found by District Chief Judge Iacobo.

Section 22 of the Act

Section 22 provides the only means for changing otherwise final compensation orders. Under Section 22, any party-in-interest, at any time within one year of the last payment of compensation or within one year of the rejection of a claim, may request modification because of a mistake in fact or change in condition. Section 22, as amended by the 1984 Amendments, states that "any party-in-interest" includes an Employer or Carrier granted relief under Section 8(f) and that the section applies to cases under which payments are being made by the Special Fund. Also, the 1984 amended version specifically provides that the section does not authorize the modification of settlements. The effective date of the amended Section 22 is specified in Section 28(3)(1) of the Amendments, 98 Stat. at 1655. **See Brady v. J. Young & Co.**, 18 BRBS 167, 170 n.5 (1985)

(**Decision on Reconsideration**); **Lambert v. Atlantic & Gulf Stevedores,** 17 BRBS 68 (1985).

The scope of modification is not narrowed because the Employer is seeking to terminate or decrease an award. **McCord v. Cephas**, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976), **rev'g** 1 BRBS 81 (1974). Section 22 was intended by Congress to displace traditional notions of **Res Judicata**, and to allow the fact-finder, within the proper time frame after a final decision or order, to consider newly submitted evidence or to further reflect on the evidence initially submitted. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459, **reh'g denied,** 404 U.S. 1053 (1972); **McCarthy Stevedoring Corp. v. Norton**, 40 F.Supp. 960 (E.D. Pa. 1940).

A request for modification need not be formal in nature. It simply must be a writing which indicates an intention to seek further compensation. **Banks v. Chicago Grain Trimmers Assoc.,** 390 U.S. 459 (1968); **Fireman's Fund Insurance Co. v. Bergeron,** 493 F.2d 545 (5th Cir. 1974), **reh'g denied**, 391 U.S. 929 (1968); **Hudson, supra**, 16 BRBS 367. However, the Benefits Review Board has held that telephone calls to the Deputy Commissioner's office, made within one year of the last payment of compensation, was sufficient to constitute a request for modification as Claimant indicated during those calls that he believed he had suffered a change in condition and was seeking additional compensation. **Madrid v. Coast Marine Construction Company**, 22 BRBS 148 (1989). A deputy commissioner's written memorandum summarizing his telephone conversation with claimant was sufficient to constitute a request for modification because the memorandum reflected that claimant was dissatisfied with his compensation. **See also McKinney v. O'Leary,** 460 F.2d 371 (9th Cir. 1972). It is irrelevant whether an action is labeled an application or modification or a claim for compensation as long as the action comes within the provisions of **Banks, supra**, 390 U.S. 459.

Similarly, a Claimant is not required specifically to characterize the modification request as being based on either a change in condition or mistake in determination of fact. **Cobb v. Schirmer Stevedoring Co.**, 2 BRBS 132 (1975), **aff'd,** 577 F.2d 750, 8 BRBS 562 (9th Cir. 1978). Moreover, an Administrative Law Judge is not precluded from modifying a previous order on the basis of a mistake in fact although the modification was

sought for a change in condition. **Thompson v. Quinton Engineers, Inc.**, 6 BRBS 62 (1977); **Pinizzotto v. Marra Bros., Inc.**, 1 BRBS 241 (1974). **See also O'Keefe v. Aerojet-General Shipyards, Inc.**, 404 U.S. 254, 92 S.Ct. 405 (1972), **reh'g denied**, 404 U.S. 1053, 92 S.Ct. 702 (1972); **McDonald v. Todd Shipyards Corp.**, 21 BRBS 184 (1988).

Modification based on a change in condition is granted where the Claimant's physical condition has improved or deteriorated following entry of the award. The Board has stated that the physical change must have occurred between the time of the award and the time of the request for modification. **Rizzi v. The Four Boro Contracting Corp.**, 1 BRBS 130 (1974).

The party requesting modification due to a change in condition has the burden of showing the change in condition. **See Winston v. Ingalls Shipbuilding, Inc.**, 16 BRBS 168 (1984) (since Claimant's inability to perform his secondary occupation of farming existed at the time of the initial proceeding and the evidence could support the Administrative Law Judge's finding of no increased loss to Claimant's injured hands, Claimant failed to demonstrate a change in condition); **Kendall v. Bethlehem Steel Corp.**, 16 BRBS 3 (1983) (Claimant did not establish that his back condition had worsened since the prior decision denying benefits and thus had no compensation disability as a result of his back injury). Since the party requesting modification has the burden of proving a change in condition, the Section 20(a) presumption is inapplicable to the issue of whether Claimant's condition has changed since the prior award. **Leach v. Thompson's Dairy, Inc.**, 6 BRBS 184 (1977).

As indicated above, the Benefits Review Board, in a reversal of prior Board precedents, held that a change in Claimant's economic condition also may provide justification for Section 22 modification. In **Fleetwood v. Newport News Shipbuilding & Dry Dock Co.**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985), the Board held that Employer should no longer have to compensate Claimant when there has been a change in Claimant's economic condition so that there is no longer a loss in wage-earning capacity. In affirming, the Fourth Circuit rejected the argument that prior cases have held to the contrary. **Finch v. Newport New Shipbuilding and Dry Dock Company,** 22 BRBS 196, 201 (1989); **Vilen v. Agmarine Contracting Inc.**, 12 BRBS 769 1980); **cf. Verderane v. Jacksonville**

Shipyards, Inc. 772 F.2d 775, 17 BRBS 154 (CRT) (11th Cir. 1985), **aff'g** 14 BRBS 220.15 (1981); **General Dynamics Corp. v. Director, OWCP**, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982), **aff'g sub nom. Woodberry v. General Dynamics Corp.**, 14 BRBS 431 (1981).

It is also well-settled that a modification order decreasing compensation may not affect any compensation previously paid, although Employer is entitled to credit any excess payments already made against any compensation as yet unpaid. A modification order increasing compensation may be applied retroactively if this Administrative Law Judge determines that according retroactive effect to the modification order renders justice under the Act. **McCord, supra,** 532 F.2d at 1381.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszie wicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale**

Shipyards, Inc., 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should become have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

Nature and Extent of Disability

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**,

903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers**

Company, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **See Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**. 394 U.S. 976 (1969). If a physician believes that further treatment should be undertaken, then a possibility of improvement exists, and even if, in retrospect, the treatment was unsuccessful, maximum medical improvement does not occur until the treatment is complete. **Louisiana Ins. Guaranty Assn. v. Abbott,** 40 F.3d 122, 29 BRBS 22(CRT)(5th Cir. 1994); **Leech v. Service Engineering Co.,** 15 BRBS 18 (1982). If surgery is anticipated, maximum medical improvement has not been reached. **Kuhn v. Associated press**, 16 BRBS 46 (1983). If surgery is not anticipated, or if the prognosis after surgery is uncertain, the claimant's condition may be permanent. **Worthington v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 200 (1986); **White v. Exxon Corp.,** 9 BRBS 138 (1978), **aff'd mem**., 617 F.2d 292 (5th Cir. 1982).

The Board has held that an irreversible medical condition is permanent **per se**. **Drake v. General Dynamics Corp.**, 11 BRBS 288 (1979). Asbestosis, in my judgment, is such a condition.

As noted above, District Chief Judge Iacobo has concluded that Claimant's permanent partial impairment began on July 1, 1988 (JX 3 at 4) and that conclusion constitutes the "Law of the Case."

Average Weekly Wage

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. **Todd Shipyards Corp. v. Black**, 717 F.2d 1280 (9th Cir. 1983); **Hoey v. General Dynamics Corporation**, 17 BRBS 229 (1985); **Pitts v. Bethlehem Steel Corp.**, 17 BRBS 17 (1985); **Yalowchuck v. General Dynamics Corp.**, 17 BRBS 13 (1985).

The 1984 Amendments to the Longshore Act apply in a new set of rules in occupational disease cases where the time of injury (**i.e.**, becomes manifest) occurs after claimant has retired. **See Woods v. Bethlehem Steel Corp.**, 17 BRBS 243 (1985); 33 U.S.C. §§902(10), 908(C)(23), 910(d)(2). In such cases, disability is defined under Section 2(10) not in terms of loss of earning capacity, but rather in terms of the degree of physical impairment as determined under the guidelines promulgated by the American Medical Association. An employee cannot receive total disability benefits under these provisions, but can only receive a permanent partial disability award based upon the degree of physical impairment. **See** 33 U.S.C. §908(c)(23); 20 C.F.R. §702.601(b). The Board has held that, in appropriate circumstances, Section 8(c)(23) allows for a permanent partial impairment award based on a one hundred (100) percent physical impairment. **Donnell v. Bath Iron Works Corporation**, 22 BRBS 136 (1989). Further, where the injury occurs more than one year after retirement, the average weekly wage is based on the National Average Weekly Wage as of the date of awareness rather than any actual wages received by the employee. **See** 33 U.S.C. §910(c)(2)(B); **Taddeo v. Bethlehem Steel Corp.**, 22 BRBS 52 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 46 (1989). Thus, it is apparent that Congress, by the 1984 Amendments, intended to expand the category of claimants entitled to receive compensation to include voluntary retirees.

However, in the case at bar, Claimant may be an involuntary retiree if he left the workforce because of work-related pulmonary problems. Thus, an employee who involuntarily withdraws from the workforce due to an occupational disability

may be entitled to total disability benefits although the awareness of the relationship between disability and employment did not become manifest until after the involuntary retirement. In such cases, the average weekly wage is computed under 33 U.S.C. §910(C) to reflect earnings prior to the onset of disability rather than earnings at the later time of awareness. **MacDonald v. Bethlehem Steel Corp.**, 18 BRBS 181, 183 and 184 (1986). **Compare LaFaille v. General Dynamics Corp.**, 18 BRBS 882 (1986), **rev'd in relevant part sub nom. LaFaille v. Benefits Review Board**, 884 F.2d 54, 22 BRBS 108 (CRT) (2d Cir. 1989).

Thus, where disability commences on the date of involuntary withdrawal from the workforce, claimant's average weekly wage should reflect wages prior to the date of such withdrawal under Section 10(c), rather than the National Average Weekly Wage under Section 10(d)(2)(B).

However, if the employee retires due to a non-occupational disability prior to manifestation, then he is a voluntary retiree and is subject to the post-retirement provisions. In **Woods v. Bethlehem Steel Corp.**, 17 BRBS 243 (1985), the Benefits Review Board applied the post-retirement provisions because the employee retired due to disabling non-work-related heart disease prior to the manifestation of work-related asbestosis. As noted above, District Chief Judge Iacobo has already concluded that Claimant is a so-called voluntary retiree, pursuant to Section 8(3)(23) of the Act. As Claimant’s March 23, 2000 pulmonary function studies have demonstrated that his pulmonary condition has worsened (JX 4) and as the parties have stipulated that his permanent partial impairment is 17.50 percent as of that date, (JX 1), Claimant is entitled to an award for such impairment, based upon his average weekly was of $594.80. (JX 2) The parties have further stipulated that Claimant’s weekly benefits total $69.39 as of March 23, 2000. (JX 1)

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins**

v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer has accepted the claim, provided the necessary medical care and treatment and has paid compensation benefits to the Claimant as required by District Chief Judge Iacobo's decision. (JX 3) **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care

and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **FMC Corporation v. Director, OWCP**, 886 F.2d 118523 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability

unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), **rev'd and remanded on other grounds sub nom. Director v. Berstresser, 921 F.2d 306 (D.C. Cir. 1990)**; **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), **aff'd**, 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, **supra**.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2D 602 (3d Cir. 1976).

An x-ray showing pleural thickening, followed by continued exposure to the injurious stimuli, establishes a pre-existing permanent partial disability. **Topping v. Newport News Shipbuilding**, 16 BRBS 40 (1983); **Musgrove v. William E. Campbell Co.**, 14 BRBS 762 (1982).

Section 8(f) relief is not applicable where the permanent total disability is due solely to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991) In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have cause claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron), supra.**

As noted above, District Chief Judge Iacobo has already concluded that the Employer was entitled to Section 8(f) relief and the Special Fund is currently paying appropriate benefits to the Claimant. Accordingly, the Special Fund shall pay to Claimant those increased benefits as of March 23, 2000, the date on which Claimant’s pulmonary function studies graphically demonstrated his worsening pulmonary status, according to Dr. John S. Urbanetti, Claimant’s treating pulmonologist for many years. (JX 4)

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as s self-insurer. Claimant's attorney filed a fee application on December 29, 2000 (CX 3), concerning services rendered and costs incurred in representing Claimant between July 17, 2000 and December 19, 2000. Attorney Stephen C. Embry seeks a fee of $697.50 based on 3.25 hours of attorney time at $209.62 per hour and 0.25 hours of paralegal time at $65.00 per hour.

In accordance with established practice, I will consider only those services rendered and costs incurred the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration.

In light of the nature and extent of the excellent legal services rendered to Claimant by his attorney, the amount of compensation obtained for Claimant and the Employer's lack of comments on the requested fee, I find a legal fee of $697.50 is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses. My approval of the hourly rates is limited to the factual situation herein and to the firm members identified in the fee petition.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

1. The Special Fund shall pay to Claimant compensation for his 17.50 percent permanent partial impairment from March 23, 2000 through the present and continuing until further **ORDER** of this Court, based upon the average weekly wage of $590.80, such compensation to the computed in accordance with Section 8(c)(23) and (2)(10) of the Act. The parties have stipulated that these benefits amount to $69.39 per week. (JX 2)

2. The Special Fund shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his injury on and after March 23, 2000.

3. Interest shall be paid by the Special Fund on any accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

4. The Employer shall continue to furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, subject to the provisions of Section 7 of the Act.

5. The Employer shall pay to Claimant’s attorney, Stephen C. Embry, the sum of $697.50 as a reasonable fee for representing Claimant herein before the Office of Administrative Law Judges between July 17, 2000 and December 19, 2000.

_____

DAVID W. DI NARDI
Administrative Law Judge

Dated:

Boston, Massachusetts
DWD:jl